Supreme Court, U.S.
FILED
SEP 20 2002
CLERK

No. 02-263

In The
Supreme Court of the United States

BTA OIL PRODUCERS, ET AL.,

Petitioners,

v.

MDU RESOURCES GROUP, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENTS MDU RESOURCES GROUP, INC.'S AND WILLISTON BASIN INTERSTATE PIPELINE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED

I. Did the petitioners timely raise a substantial federal question in the state court proceeding to provide the Court with jurisdiction under 28 U.S.C. § 1257?

II. Was the North Dakota Supreme Court's denial of the petitioners' claim of unjust enrichment arbitrary and irrational in violation of substantive due process under the Fourteenth Amendment?

STATEMENT PURSUANT TO RULE 29.6

Respondent MDU Resources Group, Inc. is a publicly traded corporation. Respondent Williston Basin Interstate Pipeline Company is an indirect wholly owned subsidiary of MDU Resources Group, Inc. No publicly held company owns 10% or more of the stock of MDU Resources Group, Inc.

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STATEMENT OF THE CASE

I. Facts.

The petitioners sold casinghead natural gas to Koch Hydrocarbon Company ("Koch"). Koch processed the raw gas at its plant in North Dakota and sold the processed products. The contracts between the petitioners and Koch did not set a fixed price for the casinghead gas. Instead, Koch paid the petitioners a price based, in part, on a percentage of the proceeds received by Koch from the sale of the processed products. The processed products included residue natural gas that Koch initially sold to Montana-Dakota Utilities Co. which subsequently became a division of MDU Resources Group, Inc. ("MDU").

MDU reduced its purchases of residue gas from Koch in 1983 because of an oversupply of natural gas. In 1985, MDU assigned its gas purchase contracts to its subsidiary Williston Basin Interstate Pipeline Company ("WBI"). Also in 1985, a dispute arose between Koch and WBI over the proper price under their contracts as a result of the deregulation for certain categories of natural gas. After January 1, 1985, WBI paid for the gas it purchased from Koch in accordance with WBI's contract interpretation that deregulated gas was to be priced at a reasonable market price. In 1987, WBI curtailed all its purchases from Koch after the parties were unable to reach agreement on various disputes. The residue gas not purchased by WBI was sold by Koch on the open market and the petitioners were paid for their casinghead gas based on the market prices received by Koch.

Koch sued MDU and WBI in the United States District Court for North Dakota in 1987 for breach of contract. In awarding judgment against MDU and WBI, the district

court reduced Koch's damage claim by 75 percent finding that, for the most part, Koch's contracts with its producers were percentage-of-proceeds contracts with the split averaging 25 percent to Koch and 75 percent to the producers. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's reduction in Koch's damage claim reasoning that Koch should be allowed to collect only the damages it sustained. *Koch Hydrocarbon Company v. MDU Resources Group, Inc.*, 988 F.2d 1529, 1547 (8th Cir. 1993). The case was remanded to the district court for a determination of damages. Koch and WBI then settled.

II. Proceedings Below.

The petitioners, as disappointed third party suppliers, brought an action in North Dakota District Court in 1997 against MDU, WBI and Koch claiming the petitioners were entitled to the additional revenue they would have received if Koch had sold its residue gas to WBI at the prices provided in the contracts between WBI and Koch. [App. C, I] The petitioners alleged state claims against MDU and WBI of unjust enrichment, implied trust and civil conspiracy. [App. I] The petitioners also brought separate unrelated claims against Koch regarding treating fees and revenues from liquid hydrocarbons that were factors into the calculation of the price paid for the casinghead gas under their contracts. [App. C, I] None of the claims asserted against MDU, WBI or Koch alleged a violation of the United States Constitution or a United States statute. [App. I]

The trial court granted summary judgment dismissing the claims against MDU and WBI based on the precedent

regarding similar claims in *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891. The petitioners appealed from the trial court judgment to the North Dakota Supreme Court. The North Dakota Supreme Court affirmed the trial court's dismissal of the petitioners' claims. Contrary to the petitioners' statement, the opinion of the North Dakota Supreme Court is reported. *BTA Oil Producers, et al. v. MDU Resources Group, Inc.*, 2002 ND 55, 642 N.W.2d 873. The petitioners subsequently filed a Petition for Rehearing which alleged, for the first time, in one paragraph, that the state court judgment denied the petitioners equal protection of the law and due process of the law under the Fourteenth Amendment to the United States Constitution. [App. G-2] The North Dakota Supreme Court summarily denied the Petition for Rehearing. [App. F]

REASONS FOR DENYING PETITION

I. The Petitioners Failed to Raise a Substantial Federal Question in the State Court Proceeding.

The petitioners assert the Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the North Dakota Supreme Court. Section 1257(a) allows review of a state court judgment by writ of certiorari where the validity of a state statute is "drawn in question" on a federal ground, or a federal right, privilege, or immunity is "specially set up or claimed." The Court has held that in reviewing a state court judgment under 28 U.S.C. § 1257, it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision. *Adams v.*

Robertson, 520 U.S. 83, 87, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). Rule 14.1(g)(i), S.Ct.R., requires a petitioner to show that the federal question was timely and properly raised in the state court proceeding. When the highest state court is silent on the federal question presented to the Court for review, the Court assumes the issue was not properly presented. *Id.* The petitioner has the burden of defeating the assumption by demonstrating the state court had a fair opportunity to address the federal question. *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981).

The petitioners concede they first raised their federal question in their Petition for Rehearing to the North Dakota Supreme Court which denied the Petition for Rehearing in summary fashion without addressing the federal question. The Court has generally refused to consider issues raised for the first time in a petition for rehearing when the state court is silent on the issue. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-550, 107 S.Ct. 1940, 1947-1948, 95 L.Ed.2d 474 (1987). The Court's refusal to consider questions first presented in a petition for rehearing is consistent with the petitioners' need to show the issue was raised "'at the time and in the manner required by the state law.'" *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62 (1988), (quoting *Webb v. Webb*, *supra* at 501).

Rule 40, N.D.R.App.P., requires that a petition for rehearing of an appeal to the North Dakota Supreme Court "shall state with particularity the points of law or fact which in the opinion of the petitioner the court *has overlooked or misapprehended.*" [Emphasis added] The North Dakota Rule is based on Fed.R.App.P. 40. See,

Explanatory Note, N.D.R.App.P., Rule 40. Although the rule has not been interpreted by the North Dakota Supreme Court, the state court is guided by and gives great deference to any federal case law interpreting the federal counterpart. *Fisher v. Fisher*, 546 N.W.2d 354, 355 (N.D. 1996). Under the federal rule, the United States appellate courts will not address legal theories raised for the first time in a petition for rehearing. *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (the theory presented in a petition for rehearing was not overlooked or misapprehended on appeal because it was never presented). Accordingly, raising a federal question for the first time in a petition for rehearing was not sufficient to properly present the question to the North Dakota Supreme Court.

Despite presenting eighteen issues for review [App. H 2-4], the petitioners did not raise a federal question in their appeal of the trial court's judgment to the North Dakota Supreme Court. Even if a federal question had been raised in the appeal to the North Dakota Supreme Court, the issue still would not have been timely raised because it was never presented to the trial court as evidenced by its lack of mention in the trial court's Memorandum Opinion and Order for Judgment. [App. D, C] Issues not raised in the trial court, even constitutional issues, generally will not be addressed on appeal by the North Dakota Supreme Court. *In Re R.O.*, 2001 ND 137, 631 N.W.2d 159.

Nor can the petitioners contend they could not have anticipated either the trial court or North Dakota Supreme Court judgment and therefore they were denied a reasonable opportunity to have the federal question heard and determined in the state court proceeding prior to the petition for rehearing. See, *Herndon v. Georgia*, 295 U.S.

441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). Both the trial court's ruling and the North Dakota Supreme Court's affirmance were based upon *Apache Corp. v. MDU Resources Group, Inc.*, 99 ND 247, 603 N.W.2d 891, in which the North Dakota Supreme Court affirmed a denial of claims essentially identical to those presented by the petitioners. [App. A-10; D-4] The petitioners, who filed an amicus curiae brief in *Apache*, could not have been surprised that trial court and the North Dakota Supreme Court ruled consistent with the recent precedent of *Apache* particularly when MDU/WBI relied on the *Apache* precedent in seeking summary judgment dismissal of the petitioners' claims. [App. E-4]

II. The Petitioners Failed to State a Federal Question.

The petitioners contend the North Dakota Supreme Court violated the substantive due process requirements of the Fourteenth Amendment by depriving the petitioners of property through denial of "their causes of action and contract rights without a rational basis and in an invidiously discriminatory manner." The constitutional guarantee of substantive due process under the Fourteenth Amendment to the United States Constitution protects an individual against arbitrary and irrational exercises of government power. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). Although the Court gives heightened scrutiny to alleged substantive due process violations of fundamental rights and liberties, the Court has been hesitant to subject economic legislation to due process scrutiny as a general matter. See *Eastern Enterprises v. Apfel*, 524 U.S. 498,

547, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998); *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The Court applies a much more deferential review in substantive due process challenges to economic legislation. *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). Government actions adjusting the burdens and benefits of economic life have a presumption of constitutionality and the burden is on the party complaining of a due process violation to establish the action was arbitrary and irrational. *Eastern Enterprises v. Apfel*, *supra* at 524. The challenge fails if the government action is rationally related to a legitimate government purpose. *United States v. Carolene Products*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

The petitioners, in their attempt to fashion a federal question from the North Dakota Supreme Court's application of North Dakota common law principles of unjust enrichment, do not contend there was a violation of one of the fundamental rights and liberties identified by the Court for heightened scrutiny. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Indeed, the petitioners fail to establish either a property interest entitled to substantive due process protection or arbitrary and irrational governmental action by the North Dakota Supreme Court.

A. The petitioners failed to show a property right in a contract or cause of action.

The petitioners' contention that they were denied their cause of action and contract rights assumes, of course, that the petitioners had contract rights or a cause of action that were denied by the state court. The petitioners acknowledge they had no contracts with MDU or WBI. And unlike the plaintiffs in *Apache Corporation v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 891, who unsuccessfully claimed they were third party beneficiaries to the contracts between WBI and Koch, the petitioners did not assert any contract claims against MDU/WBI. [App. I] Instead, the petitioners' claims against MDU/WBI were limited to equity claims of unjust enrichment and implied trust. [App. I]

MDU/WBI's contracts were with Koch and not with the petitioners. The damages for breach of those contracts were determined by the district court in Koch's action against MDU/WBI and affirmed by the Eighth Circuit Court of Appeals. *Koch Hydrocarbon Company v. MDU Resources Group, Inc.*, 988 F.2d 1529 (8th Cir. 1993). The Eighth Circuit Court affirmed an award of damages against MDU/WBI for breach of the contracts based upon the amount of damages sustained by Koch:

> The District Court found that, for the most part, Koch's contracts with other natural gas suppliers who provided some of the gas that Koch in turn sold to MDU were percentage-of-proceeds contracts. Under these contracts, Koch would process the gas and sell what amounts it could for the best available price, then pay the producer a percentage of the proceeds from those

> sales. Concluding that the split averaged seventy-five percent to the other producer and twenty-five percent to Koch, the court reduced the price damages Koch claimed by seventy-five percent.
>
> In this appeal, Koch argues that the damage award should not have been reduced, since Koch may yet be obligated to reimburse the producers for their seventy-five percent share. We reject this argument. The court did not enforce the contract by ordering specific performance but merely awarded Koch its actual damages. MDU was not ordered to take the gas and pay for it, in which case Koch would be liable to the producers for a percentage of the proceeds. The other producers did not intervene in Koch's suit, and Koch should be allowed to collect only the damages it sustained. If the gas was not sold, Koch did not owe the producers their cut; if Koch did sell to other customers the gas that MDU contracted to buy, Koch presumably paid the producers the appropriate percentage from those proceeds, and the producers would have no further recourse against Koch.

988 F.2d at 1547.

The petitioners had no contract rights either in the contracts or contract prices between WBI and Koch. At best, the petitioners had an expectancy that the natural gas they produced would be processed and the residue gas sold by Koch at the contract prices contained in the contracts between Koch and WBI. See, *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶35, 642 N.W.2d 873, 884. That expectancy, however, did not create a contract right. The petitioners' contracts were with Koch Hydrocarbon. They have not shown or even claimed, with

the exception of an unrelated issue regarding treating fees and liquid hydrocarbons, that they were not paid in the proper manner by Koch under their contracts. If the petitioners wanted a contract right to obtain prices for their gas equal to the contract prices contained in Koch's contracts with WBI, those prices could have been specified in the petitioners' contracts with Koch. Instead, the petitioners negotiated percentage-of-proceeds contracts that entitled them to a price based on the proceeds received by Koch from the actual sale of the gas without regard to whether that gas was sold under contracts with WBI or to another party. As determined by the North Dakota Supreme Court, the petitioners received full performance under the terms of their contracts with Koch. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶44, 642 N.W.2d 873, 886.

The petitioners' assertion that they were denied a property interest in the form of a cause of action against MDU/WBI is also without merit. The trial court determined, and the North Dakota Supreme Court affirmed, that the petitioners did not have a cause of action against MDU/WBI. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶27, 642 N.W.2d 873, 882-883. Although petitioners argue they satisfied each of the elements to establish a cause of action for unjust enrichment under North Dakota common law, the North Dakota Supreme Court disagreed and determined that the petitioners, like the plaintiffs in *Apache*, failed to establish the essential element of recovering under a theory of unjust enrichment; i.e., "receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶21, 642 N.W.2d 873, 881,

quoting Apache Corporation v. MDU Resources Group, Inc., 1999 ND 247, ¶15, 603 N.W.2d 891. The North Dakota Supreme Court declined the petitioners' invitation to overrule the holding in *Apache* that when the alleged impoverishment results from a valid contractual arrangement made by a party, such as the percentage of proceeds contracts between the petitioners and Koch, the result is not contrary to equity and there has been no unjust enrichment. *Id.* at ¶23.

Only if the Court independently reviews and determines contrary to the decision of the North Dakota Supreme Court that the petitioners had a cause of action for unjust enrichment under North Dakota common law, can the petitioners meet the threshold requirement of a property interest entitled to substantive due process protection. This Court, however, does not exercise jurisdiction under 28 U.S.C. § 1257 to review state law questions and the Fourteenth Amendment does not permit a party "to bring to the test of a decision in this court every ruling made . . . in a state court." *Buchalter v. People of State of New York,* 319 U.S. 427, 430, 63 S.Ct. 1129, 1131, 87 L.Ed. 1492 (1943).

The North Dakota Supreme Court is the ultimate authority on issues of North Dakota common law. Pursuant to that authority, the petitioners had no cause of action against MDU/WBI. Even if the petitioners could show that the North Dakota Supreme Court somehow erred in the application of its own common law principles of unjust enrichment, the Fourteenth Amendment does not guarantee that decisions of the state courts are free from error. *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 299, 58 S.Ct. 185, 188, 82 L.Ed. 268 (1937).

B. The petitioners failed to show that the state court's denial of the petitioners' claim of unjust enrichment was arbitrary and irrational.

The petitioners allege the North Dakota Supreme Court's dismissal of their unjust enrichment claim was invidious, arbitrary and capricious because the Court's ruling benefited the primary utility in North Dakota at the expense of gas producers who were neither incorporated nor had their principal place of business in North Dakota. The petitioners cite cases in support of their position that the Court has struck down as unconstitutional disparities in treatment of in-state and out-of-state interests. The cited cases, however, involve alleged violations of the dormant Interstate Commerce Clause and not alleged violations of substantive due process.

The petitioners are unable to meet their burden of showing that the North Dakota common law principles of unjust enrichment, or their application by the North Dakota Supreme Court, were arbitrary and irrational. The North Dakota Supreme Court relied upon its prior opinion in *Apache Corp. v. MDU Resources Group, Inc.*, *supra*, which held that where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity. 1999 N.D. 247 at ¶15. In support of its opinion in *Apache*, the state court quoted an explanation from Dan B. Dodds, *Law of Remedies*, § 4.9(4), page 482 (2d Ed. 1993) regarding the applicability of restitution in three-way commercial transactions. Dodds explained that in transactions involving three parties where the parties could have contracted each with both others but did not do so, the separate contracts convey the limited kinds of liability and exposure each party intends. The

state court quoted Dodds that "[r]espect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other." *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, ¶14, 603 N.W.2d 891 (quoting Dan B. Dodds, *Law of Remedies*, § 4.9(4) at 482).

Therefore, the North Dakota Supreme Court's denial of the petitioners' unjust enrichment claim was not only consistent with its prior application of unjust enrichment principles, but also consistent with restitution principles recognized by other authorities. In contrast, as noted by the North Dakota Supreme Court, the petitioners have never cited a single decision from any jurisdiction allowing third party suppliers such as the petitioners to recover for unjust enrichment under facts similar to those presented in this case. *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶23, 642 N.W.2d 873, 882.

The petitioners provide no support for their assertion that the North Dakota Supreme Court's ruling was based upon the residency of the parties. On their face, the unjust enrichment principles relied upon by the state court apply regardless of the residency of the parties. The principles, on their face, are neither arbitrary nor irrational. Nor is there anything in the North Dakota Supreme Court's opinion that suggests its application of the common law principles was influenced by the residency of the parties. Although Montana-Dakota Utilities Co. is a primary natural gas distributor in North Dakota, it also distributes natural gas in other states. WBI is an interstate pipeline company operating under the jurisdiction of the Federal Energy Regulatory Commission. It provides service in states other than North Dakota. Ironically, it was the petitioners who championed that they represented "oil and

gas producers and agricultural interests, which are among the cornerstones of [North Dakota's] economy." [App. H-16] The petitioners argued that if the North Dakota Supreme Court affirmed the trial court judgment, "purchasers of processed or manufactured products will reap windfalls at the expense of local producers." [App. H-18] The North Dakota Supreme Court, however, applied the principles of unjust enrichment consistent with the facts and North Dakota common law without regard to the geographic interests of the parties.

The petitioners argue the North Dakota Supreme Court "dramatically diverged" from the language of the state court's traditional five element test of unjust enrichment in order to deny the petitioners their cause of action and contract rights. The North Dakota Supreme Court's holding in this proceeding, and in *Apache,* that a party asserting a claim for unjust enrichment must establish that the claimed enrichment must be a "benefit at the direct expense" of the complainant has been consistently recognized by the state court. See *A&A Metal Buildings v. I-S, Inc.*, 274 N.W.2d 183 (N.D. 1978); *Midland Diesel Service & Engine Co. v. Sivertson*, 307 N.W.2d 555 (N.D. 1981). The parties in both of the above cited cases appear to have been North Dakota parties. Similarly, the North Dakota Supreme Court cited *Albrecht v. Walter*, 572 N.W.2d 809 (N.D. 1997) for the proposition that "[w]hen the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity". *BTA Oil Producers v. MDU Resources Group, Inc.*, 2002 ND 55, ¶ 23, 642 N.W.2d 873, 882. This proposition is an adjunct of the fourth of the North Dakota Supreme Court's frequently stated elements of unjust enrichment that there must be an absence of a justification for the

enrichment and the impoverishment. *Apache Corp. v. MDU Resources Group, Inc.*, 99 ND 247, ¶13, 603 N.W.2d 891, 894. In *Albrecht v. Walter*, *supra*, the North Dakota Supreme Court determined that a payment contribution from the defendant to the plaintiffs would not constitute unjust enrichment because the contribution was consistent with a valid contractual arrangement made by the defendant. The parties were North Dakota residents.

The North Dakota Supreme Court consistently applied North Dakota principles of unjust enrichment in affirming the dismissal of the petitioners' claims against MDU and WBI without regard to the residency of the parties. Those principles are rationally related to the state's interest in defining when the courts of North Dakota will provide equitable relief to parties. The North Dakota Supreme Court rationally determined that it will not provide an equitable remedy of unjust enrichment when the party's alleged impoverishment results from a contract arrangement made by the party.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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